


<b>COLORADO DISTRICT COURT, 20TH JUDICIAL DISTRICT</b>  <b>PERMALINK:</b>	  <b>^^^ COURT USE ONLY ^^^</b>
<b>APPELLANT(S):</b>  Gato GAVIRIA  <b>DEFENDANT(S):</b>  The State of COLORADO	
<b>CASE NUMBER:</b> CO-23-EX-0001/QWT <b>JUDGE:</b> NewPlayerqwerty, Chief U.S.D.J.	
<b>ON AN APPEAL FROM THE COUNTY COURT BOULDER COUNTY</b>	

## **I. BACKGROUND**

- The petitioner, Mr. Gato Gaviria, is a Hispanophone who, over the summer of 2023, was defendant to a civil action for tort brought by Attorney Yada, heard before ARTIST, J. Our learned and esteemed colleague entered an order against the petitioner holding him liable of assault on the 24th July at 22:14 UTC, entering a second order shortly thereafter ordering, approximately half an hour later following a short hearing, the petitioner to \$600 in damages and to write an apology to the plaintiff, requiring that the said apology exceed 500 words and that it be “sincere, respectful, and directly address the plaintiff. We attach a link to the record of that case to this judgment. The record demonstrates that in the few days ensuing the order, the petitioner made payment of the damages, and filed with the court an apology written in Spanish<sup>1</sup>, which he explained to be his native language. After being ordered to translate the

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<http://web.archive.org/web/20231013204631/https://docs.google.com/document/d/1CG3OxIifzRaXccc67x8Kk8yJSxUsLqFsY1JvHEKu4pI/mobilebasic>

apology into English, the petitioner produced such a translation<sup>2</sup>, which the plaintiff in the action objected to, affirming, with the aid of screenshots from websites purporting to detect artificial intelligence-written texts, that the text that the petitioner in this action provided was in fact written by such a technology<sup>3</sup> – since “[i]t is not uncommon for courts to take judicial notice of factual information found on the world wide web.” *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) we take judicial notice of the critical and, as far as we can tell, undisputed fact that

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<sup>2</sup> Subject: A sincere apology for the tragic incident that occurred Dear Attorney\_Yada, I am writing to you today with a heart full of pain, remorse and deep regret for the inexcusable incident that occurred a few days ago. I cannot express enough how sorry I am for the pain I caused you and the terrible consequences of my actions. The tragic situation in which we find ourselves is a constant reminder of the impermanence of life and the fragility of our decisions. I never imagined that something like this could happen, and now I am faced with the reality that my irresponsible and negligent actions have had an irreversible impact on your life and the lives of your loved ones. There is no valid excuse that justifies my behavior. I feel overwhelmed with shame and guilt, knowing that my lack of judgment has left an indelible mark on his life and the lives of those around him. The knowledge that my reckless act has caused pain and suffering to a person whom I respect and admire as a professional and as a human being, breaks my heart. In despair, I search for answers as to how I could have come to commit such a heinous act. I realize that there is no simple answer, but I take full responsibility for my actions and am willing to face the legal and moral consequences of this terrible act. Throughout these days since the incident, I have been reflecting deeply on my life and my choices. It is clear to me that I need to address my internal issues and work to improve myself as a person. Not just for me, but to prevent something like this from happening again and to honor those who have been affected by my behavior. I understand that my words may seem insufficient, but I want you to know that my regret is genuine and that there is nothing I want more than to go back in time and change what happened. My heart is devastated by the pain it caused and I am committed to taking all necessary steps to right my wrongs. I know it is not easy to forgive the unforgivable, but please consider my sincere apologies. I don't expect you to forget what happened or absolve me of my actions, but I do hope that one day you can find it in your heart to forgive. I am willing to do everything possible to make up for the damage he caused and to contribute to the well-being of those who have been affected by this tragic event. I thank you for reading this letter and for taking the time to consider my words. I am deeply sorry for the pain it caused you, and I want you to know that I will always be willing to face the consequences of my actions and do everything in my power to be a better person in the future. With humility and sincerity, GatoGaviria

<sup>3</sup> We find it of potential interest to note a colleague in Arizona recently discussed the statistical irrelevancy of similarity in artificial-intelligence detection, see *Loreto v. Ariz. Bd. of Regents*, CV-22-00269-TUC-JAS (AMM), at \*7 n.4 (D. Ariz. Sep. 27, 2023).

internet-based services exist<sup>4</sup>, and that such technologies constitute “artificial intelligence automated drafting programs” *Belenzon v. Paws UP Ranch, LLC*, CV 23-69-M-DWM, at \*1 (D. Mont. June 22, 2023) offering a means by which short prompts generate longer strings of text. See *Mata v. Avianca, Inc.*, 22-cv-1461 (PKC) (S.D.N.Y. June 22, 2023), *Vital Pharm. v. Owoc (In re Vital Pharm.)*, No. 22-17842-PDR, at \*6 n.12 (Bankr. S.D. Fla. June 16, 2023).

2. The record furthermore reflects that the submitted English-version apology was apparently several words short of the mandated length, although our petitioner maintains that the original Spanish version did indeed meet the 500-word minimum length requirement. He was thereafter ordered to submit a new apology meeting the mandated length, which he did ultimately produce<sup>5</sup>, although our brother judge saw fit to observe that

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<sup>4</sup> See, for instance, OpenAI. (2023). ChatGPT [Large language model]. <https://chat.openai.com>.

<sup>5</sup> Dear Attorney\_Yada, I hope this letter finds you, despite the circumstances, and that you can sense the genuine remorse and sorrow in my words. I must begin by expressing the depths of my pain and regret for the inexcusable incident that unfolded a few days ago. The enormity of my actions has weighed heavily on my heart, and I am overwhelmed by the magnitude of the pain I have caused you and the grave consequences that followed. This tragic turn of events serves as a constant reminder of the fragility of life and the lasting impact of our choices. I never imagined that such a grievous mistake could occur, and I now face the harsh reality that my reckless and negligent behavior has irreversibly altered your life and the lives of your loved ones. I understand that there are no valid excuses for my conduct, and I carry an immense burden of shame and guilt, recognizing that my lack of judgment has inflicted an indelible mark on your life and the lives of those around you. The realization that my actions have caused pain and suffering to someone whom I deeply respect and admire, both professionally and as a fellow human being, breaks my heart. In my moments of despair, I've been searching for answers to understand how I could have committed such a heinous act. While I recognize that there is no simple explanation, I fully accept responsibility for my actions and am ready to face both the legal and moral consequences of this terrible incident. During the days following the event, I have engaged in profound introspection, confronting the flaws within myself and recognizing the need for personal growth. My commitment to change goes beyond mere words; I understand that I must address my internal issues to prevent anything like this from happening again and to honor those who have been affected by my actions. I am aware that words alone cannot undo the pain and damage I have caused. Nevertheless, I want you to know that my regret is genuine, and there is nothing I desire more than to turn back time and undo what has occurred. The anguish in my heart is a testament to the depth of my

the apology “does not even mention the events thus harm caused isn’t acknowledged” and informed the petitioner in this cause that he disposed of several hours in which to file a new, compliant, apology. Shortly over a day later, JUDGE ARTIST scheduled a contempt of court hearing, during which petitioner submitted that he had a busy schedule and was unable to provide a fuller apology within the time allowed (approximately 8 days), after which our brother judge ordered (at 22:55 UTC) that the petitioner surrender himself to an appropriate law enforcement officer, or purge his contempt by submitting an apology before 1691024400 Unix time<sup>6</sup>. Two and a half hours later, our petitioner submitted one final iteration of his apology<sup>7</sup>, which appears to have been acknowledged by the court. JUDGE

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remorse, and I am dedicated to taking all necessary steps to make amends for my wrongdoings. I understand that forgiveness may be an arduous journey, considering the gravity of my actions. I harbor no expectation of absolution, nor do I ask you to forget the pain I inflicted. However, I sincerely hope that, in time, you might find it in your heart to grant me the possibility of redemption. I am determined to do everything within my power to rectify the damage caused and contribute to the well-being of those affected by this tragic event. I cannot thank you enough for reading this letter and allowing me the chance to express my profound regret. I am deeply sorry for the pain I have caused you, and I assure you that I will always be prepared to accept the consequences of my actions and strive to become a better person in the future. I acknowledge that conveying the depth of my despair and regret through this apology is challenging, but I assure you that every word comes from a place of utmost humility and sincerity. With heartfelt apologies and remorse,

<sup>6</sup> Aug 03 2023 01:00:00 UTC, see <https://www.unixtimestamp.com/>

<sup>7</sup> Dear Attorney\_Yada, I am writing to you today with a heavy heart, a heart weighed down by the immense remorse and regret that consumes me over the tragic incident that unfolded between us. There are no words to express the depth of my sorrow for my actions that day, and I can only hope that this letter will convey the profound remorse I feel. The memory of that dreadful day remains etched in my mind, haunting me like a relentless specter. It was a moment that turned my world upside down, as your companion threw the grenade at me and at my friends, panic gripped me tightly. In my fear and desperation, I reacted impulsively, firing my weapon, and forever altering the course of our lives. I want to take this opportunity to emphasize that I never intended for such a calamitous outcome to occur. My response was born out of a moment of sheer terror, and I deeply regret that my actions resulted in causing you unimaginable pain and suffering. I am devastated by the realization that I have caused profound harm to you and your loved ones, and for that, I am truly sorry. The gravity of the shooting weighs heavily on my conscience. I have spent countless sleepless nights grappling with the repercussions of my impulsive decision. The pain I have caused you is a burden that I will carry with me for the rest of my life, a constant reminder of the consequences of my actions. The incident has been an

ARTIST forthwith invited the plaintiff in that cause to “acknowledge when read so i [sic] can close<sup>8</sup>”, to which the plaintiff objected by observing that the apology was filed past the deadline (01:25 UTC), inviting that the court let the contempt stand, which the court did not explicitly address, observing simply “that’s unfortunate”<sup>9</sup>.

## II. DISCUSSION

3. The petition before the court today presents a number of novel questions of law which require our careful and attentive adjudication, chief among which relate to jurisdictional or quasi-jurisdictional questions of characterisation of the original proceedings (B) and, for want of a better word, cause of action, or characterisation of these proceedings (C), but in order for us to do so effectively, we must first understand what framework we must work in (B).

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agonizing wake-up call for me, forcing me to confront the darkness within myself and the importance of self-control in the face of danger. I have been soul-searching ever since, seeking to understand how I could have allowed myself to react in such a devastating manner. This introspection has instilled in me a fervent determination to learn from my mistakes, to grow as a person, and to never again let fear govern my actions. I understand that my remorse cannot undo the pain and trauma you have endured, nor can it erase the anguish that you and your loved ones are enduring. However, I hope you can find it in your heart to believe in the sincerity of my apology. I acknowledge that I cannot change the past, but I am committed to doing everything within my power to make amends and support you in your journey to healing. I am fully aware that the legal consequences of my actions are severe, and I am prepared to face them with humility and responsibility. I will cooperate fully with the authorities and take accountability for my behavior. I also want to extend my sincerest apologies to your family and loved ones, as I recognize that my actions have caused them immeasurable pain and anguish as well. I hope that, in time, they might find it in their hearts to see that my remorse is genuine, and that I am committed to taking steps towards becoming a better person. Attorney\_Yada, words may fall short in expressing the depth of my remorse, but please know that my apology is earnest and heartfelt. I will forever carry the weight of my actions and the profound consequences they have brought. I am truly sorry for shooting you that day, and I sincerely hope that one day, you might find it in your heart to consider forgiving me. With the utmost humility and a heart full of remorse, GatoGaviria

<sup>8</sup> Close the electronic case communications channel/file/ECF.

<sup>9</sup> In the record of this particular petition, JUDGE ARTIST clarified that the plaintiff had “two hours” in which to purge his contempt by issuing a compliant apology, which he failed to do, leading to his “conviction”.

## A – The original contempt

### Determining jurisdiction

4. Our first task – and we are scarcely assisted in this by the parties, is to determine whether we sit today as a court of federal or state jurisdiction, for we, and our learned colleague JUDGE ARTIST own each two caps, one as a judge of the United States and the other as a judge of the State of Colorado. In doing so, despite the parties’ silence, we must look to indicia such as the nature of the action, the causes of action raised and venue and citizenship of the parties. The original action, *Yada v. Giviria et al.* 2:23-cv-0008/ART, despite alleging federal jurisdiction, appears to this court to be a pure exercise of state jurisdiction — contrary to what is alleged, the action arises under a tort at common law, between parties who do not appear to have diversity of citizenship at all, whether minimal or complete. No motion for removal appears to have been brought before ARTIST, J. – 28 U.S.C. § 1446, and we perceive generally no other ground for federal jurisdiction. It follows that we find the action at the bar of our brother judge to have been one in exercise of his jurisdiction as a judge of the County Court of the State of Colorado.

### The Contempt

5. We next attempt to divine the nature of the contempt issued to the petitioner for this in no small part conditions both the procedural and substantive conditions which we must apply at the later stages of this proceeding. From here on, we must with a heavy heart embark on what is normally “an experience which is totally alien” *United States v. Diaco*, 448 F. Supp. 978, 981 (D.N.J. 1978) to most judges – and fortunately so.
6. We begin with the truism of a familiar dichotomy – “A contempt proceeding may be either criminal or civil.” *In re Gindi*, 642 F.3d 865, 871

(10th Cir. 2011) *overruled in part on other grounds TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011). This distinction “is important because [c]riminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.” *Law v. National Collegiate Athletic Assoc.*, 134 F.3d 1438, 1442 (10th Cir. 1998) (quoting in part *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 826 (1994)) (internal quotations and citation omitted). With civil contempt, on the other hand, “the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket.” *In re Lucre Management Group, LLC*, 365 F.3d 874, 876 (10th Cir. 2004). By extension, “in civil contempt proceedings all that is required to satisfy the Due Process Clause is that defendants be given reasonable notice and an opportunity to be heard.” *F.T.C. v. Kuykendall*, 371 F.3d 745, 754 (10th Cir. 2004) (*en banc*). To this general dichotomy we briefly add that courts can, of course, exercise a power of summary criminal contempt in “exceptional circumstances” *In re Contempt Order*, 441 F.3d 1266, 1269 (10th Cir. 2006). The Supreme Court once expressed the distinction as thus:

“An unconditional penalty is criminal in nature because it is solely and exclusively punitive in character. A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act.”

*Hicks v. Feiock*, 485 U.S. 624, 633 (1988) (citation and quotation marks omitted).

7. Simply put, “[o]nce a civil contemnor complies with the underlying order, he is purged of the contempt and is free.” *Turner v.*

*Rogers*, 564 U.S. 431, 442 (2011). Of course, a civil contempt sanction may of course – and we, subjectively, think out of equitable charity in most cases ought to be – preceded by a period in which the contemnor may escape *all* sanction by simply complying with the order, see *Fed. Trade Comm'n v. Zurixx*, 26 F.4th 1172 (10th Cir. 2022), but once that sanction commences, the contemnor must be able to cause such sanction to cease once he has complied. To our mind it is at present superfluous to complicate matters further by considering whether or not the fact that “[c]ontempt proceedings are governed by rule” *In re A.C.B.*, 507 P.3d 1078, 1083 (Colo. App. 2022) in the State of Colorado may, in fact, impinge upon our enquiry at this stage, for in this State “[c]ivil contempt proceedings are remedial in nature and are not intended to punish the [contemnor] or to deter offenses against the public. In contrast, criminal contempt proceedings are designed to preserve the power and vindicate the dignity of the court by imposing punishment on the [contemnor].” *In re Estate of Hossack*, 303 P.3d 565, 571 (Colo. App. 2013) (quoting *In re Marriage of Cyr*, 186 P.3d 88, 91 (Colo. App. 2008)). The proximity of this language to that of the Federal standard allow us, mercifully perhaps, to proceed to the next stage of our consideration without further reference to authorities.

8. We are ultimately quite dubious of the character of the order as one of civil contempt. The very origins of these proceedings arise from an attempt on the part of the petitioner – somewhat misguided, see *infra* – to expunge from his *criminal record* that of his incarceration for contempt of court. Once the short deadline passed, the defendant was unable to purge his contempt with a view to preventing his continued subjection to sanctions. These traits appear very wholly to this court to bear the hallmarks of a form of *criminal*, not *civil*, contempt.

## **B – Assessing jurisdiction**

### **The Principles**

9. As we previously discussed, one of the oddities of our role as judges of this court is that, in a wholly unprecedented manner, we, the trial bench, are the honoured and humbled custodians of a great many hats (or more fittingly, robes, gavels and wigs). Since our role compounds those of multiple of our real-life colleagues, see G.M.D. § 1-08, we find ourselves at times seised of actions as an ordinary Federal District Court – and in this event as a District Court of one of a number of districts, at perhaps even – this is an open question which we do not claim to resolve today – as the special United States Courts (such as the Court of Federal Claims or the Court of International Trade), or indeed as a court of state jurisdiction, sitting in such instances as one of a number of trial courts of a State. By reason of our concurrent jurisdiction, such instances appear to scarcely be an “academic” hypothesis but a common jurisdictional question of great recurrence — since the question is inherently jurisdictional, as well as practical, for there remains the question of the applicable law, we feel as if a court is obliged to raise it *sua sponte*. Although perhaps we may leave our discussion there for the purposes of this case, since “habeas proceedings are different from ordinary civil litigation and, as a result, our usual presumptions about the adversarial process may be set aside” *U.S. v. Mitchell*, 518 F.3d 740, 746 (10th Cir. 2008), it is not to our mind proper for us to merely gloss over it and do as please, since “[t]he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.” *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 112, 65 S. Ct. 1464, 1471, 89 L. Ed. 2079 (1945). All the jurisdictions whose court we may from time to time sit as require it, see *Santos-Zacaria v. Garland*, 598 U.S. \_\_\_, slip. op. at 4, No. 21-1436, at \*7 (May 11, 2023) (“courts

must enforce jurisdictional rules sua sponte, even in the face of a litigant's forfeiture or waiver”), *St. Marks Place Housing v. U.S. Dept Housing*, 610 F.3d 75, 79 (D.C. Cir. 2010) (“courts must consider jurisdictional issues sua sponte”), *City of Albuquerque v. Soto Enters., Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017) (“jurisdictional defects . . . cannot be waived and can be raised sua sponte by the court”), *Shulman v. Kaplan*, 58 F.4th 404, 408 n.1 (9th Cir. 2023) (“[F]ederal courts are required to examine sua sponte jurisdictional issues such as standing.”) (quoting *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999)), *People v. S.X.G.*, 269 P.3d 735, 737 (Colo. 2012) (“Because we must always satisfy ourselves that we have jurisdiction to hear an appeal, we may raise jurisdictional defects sua sponte, regardless of whether the parties have raised the issue.”), *Dean v. U.S.*, 938 A.2d 751, 769 (D.C. 2007) (“Where a substantial question exists as to this court's subject matter jurisdiction, it is our obligation to raise it, sua sponte, even though, as here, no party has asked us to consider it.”), *Holdaway-Foster v. Brunell*, 330 P.3d 471, 474 (Nev. 2014) (“a challenge to a court's subject matter jurisdiction is not waivable . . . and can be raised at any time, or reviewed sua sponte by an appellate court”) accord *Peck v. Crouser*, 295 P.3d 586, 587 n.1 (Nev. 2013) (“This court may consider jurisdictional issues sua sponte.”). The frequency of the need to operate such distinctions is hardly commensurate with their often considerable complexity, where the court will need to comprehend and interact with a number of complex concepts of law in order to make such a determination. We are not aware of any other judgment issued by this court which has spoken to the peculiarisms of this issue.

10. We could of course, continue to exist in the – we suspect vain – hope that litigants and litigators take notice of the multitude of judicial fora open to them and incarnated in the same judges, and in the interim

take inspiration from our fellow citizens whom are diagnosed with dissociative identity disorder, interpreting only the plain language of the assertions of jurisdiction before us and dismissing for want of it. This theory, however, like the clinical condition of dissociative identity disorder, is itself a generator of numerous dysfunctionments which, to our mind, defeat the ends of justice. We begin by noting that in all civil proceedings, there exists some variant of the requirement to ensure “just, speedy, and inexpensive determination of every action”, see generally Rule 1 of most Rules of Civil Procedure, and that in some cases they go even further, explicitly mandating that the rules be “liberally construed” Colo. R. Civ. P. 301, or that when “literal application of a rule would work hardship or injustice in a particular situation” Nev. Justice. Ct. R. Civ. P. 1, see also, *inter alia*, N.H. R. Super. Ct. 1, we may derogate from them to pursue the interests of justice. Most Rules of Civil Procedure further reinforce this principle in their general rules of pleading – typically Rule 8 – which, as a general rule, provide variously that “[p]leadings must be construed so as to do justice”, and that “[i]f a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so”. See generally Fed. R. Civ. P. 8.

11. In edicting rules of this pedigree, we note lastly that our several states and the United States each sought to put an end to the practice of forms of action of which the question of multiple jurisdictions and procedures is, although not a perfect analogy, somewhat reminiscent – the same party may bring before the same judge different proceedings over the same facts, leading to different procedures governing different remedies – and unlike the bygone era in which the “wrong form of action” might have led to relief being denied, nowadays, “it is the substance not the form of

the action which governs” *Bartlett v. Bartlett*, 221 F.2d 508, 510 (D.C. Cir. 1954). The rules governing the “single form of action” appear most usually as the second rule in most Rules of Civil Procedure. Whilst Fed. R. Civ. P. 2 states simply “There is one form of action—the civil action.”, occasionally ideologically and functionally proximate rules further enlighten us on its purpose, see for instance N.Y. CPLR 103(c), which serves not “to encourage such conduct, but rather as intending . . . to afford the opportunity to avoid unnecessary dismissals of claims inadvertently brought in the wrong form” *Davidson v. Capuano*, 792 F.2d 275, 281 (2d Cir. 1986).

12. We fail, of course, to see how the ends of justice could properly be satisfied by automatic and categorical dismissal — such a course of action would hardly serve to promote just, speedy and inexpensive resolution, nor would a pleading constructed in this way “do justice”. Fortunately, we are guided in several areas by authority which, without affirmatively addressing all of the particularities of the question at our bar lead us to be guided by several paramount principles.
13. To begin with, we must consider the extent to which a court ought to raise and consider these issues. We recall, by way of an example, that courts in most jurisdictions positively command us to construe a *pro se* party’s “inartful pleading[s] liberally” *Boag v. MacDougall*, 454 U.S. 364, 365 (1982), see *United States v. Qazi*, 975 F.3d 989, 993 (9th Cir. 2020) (“We are specifically directed to construe *pro se* pleadings liberally.”) (internal quotation marks omitted), *U.S. v. Byfield*, 391 F.3d 277, 281 (D.C. Cir. 2004) (“court has an obligation to construe *pro se* filings liberally”) (quoting *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002)), *People v. Bergerud*, 223 P.3d 686 (Colo. 2010). The limits of this construction of course are that whilst “a *pro se* complaint,

however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), such a largesse may not disregard the fact that “the courts’ obligation to construe pro se filings liberally is at constant tension with the duty against assuming the role of an advocate: liberally construing a *pro se* pleading does not mean supplying additional factual allegations or offering a legal theory on a petitioner's behalf” *Childers v. Crow*, 1 F.4th 792, 810 (10th Cir. 2021), for the objective of this form of liberalism is not to procure some sort of advantage for the pro se litigant but to recognise that “even skilled *pro se* attorneys are at a disadvantage” *Chowaniec v. Arlington Park Race Track, Ltd.*, 934 F.2d 128, 132 (7th Cir. 1991). As an unfortunate aside, this court most certainly hopes that the Federal Bar Association and its membership shall take but slender offence at the insinuation that the principle ought, if justice is to be meaningfully rendered before the bench at all, at times times hold true towards the professional bar as well. We nevertheless ingest this line of precedent as food for thought as we consider several others which ought to guide our understanding.

14. Perhaps more importantly, we must not forget that questions of applicable law are not altogether unprecedented, and Federal courts have developed a sophisticated jurisprudence when faced with questions arising out of diversity jurisdiction, of which two strands to our mind appear particularly relevant — *Erie* and joinder. We begin with *Erie*. Whilst the *Erie* doctrine itself is of considerable sophistication, we can nevertheless express it simply for the mere purposes of understanding its utility and persuasiveness – to put it very simply, when we hear an action which does not arise under the laws of the United States – almost always diversity – “we are obligated by the *Erie* doctrine to apply the substantive law of the forum state . . . but we apply federal procedural law.” *Scottsdale Ins. Co. v.*

*Tolliver*, 636 F.3d 1273, 1277 (10th Cir. 2011). The objective of course, is to prevent serve now-famous “twin aims”, namely “discouragement of forum-shopping and avoidance of inequitable administration of the laws” *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 416 (1996) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)). Federal courts have rejected and refined narrow and broad definitions of the *Erie* doctrine – as we propose to discuss below, analogous considerations inevitably come to influence us in comprehending when to apply both substantive and procedural law.

15. Moving onto joinder, we note that similarly, prudential and equitable reflections enter into our equation here again. Within this context, one court of appeals held:
16. "The plaintiff has the right to 'control' his own litigation and to choose his own forum. This 'right' is, however, like all other rights, 'defined' by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious."
17. *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988) (quoting *Schutten v. Shell Oil Co.*, 421 F.2d 869, 873 (5th Cir. 1970)), accord Wright, Miller and Kane, 7 Fed. Prac. & Proc. Civ. § 1602 (3d ed.). Despite a plaintiff (or defendant's) attempt to elect proceedings in State court, we are able, for instance, to defeat a challenge to the complete diversity requirement where “equity and good conscience” allow otherwise, see *Symes v. Harris*, 472 F.3d 754 (10th Cir. 2006). For further discussion on the relevance of this theory, see *infra*.

18. Taken collectively, the court may commence to form a “mosaic” of Federal jurisprudence — it would not, however, we feel, be complete without a wider discussion of the context in which we may raise issues *sua sponte*. In relation to the grounds of dismissal under Fed. R. Civ. P. 12(b), for instance, we are normally unable to raise improper venue, lack of personal jurisdiction or improper service of process *sua sponte*. We can, on our own motion, move for summary judgment, judgment on the pleadings or for dismissal for failure to state a claim, and convert between them, but are required to notify the parties such that they may present any relevant pleadings. For an in-depth discussion of these issues, see *Auditors of America v. United States et al.*, 2:23-CV-0023/QWT no. 23/01 (D. Colo. Oct. 8 2023) and authorities cited therein. We note that the requirement for notice appears to be slightly more equivocal when amending a complaint would be completely futile, see *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 127 (D.C. Cir. 2012) (“The district court may sua sponte dismiss a claim pursuant to Rule 12(b)(6) without notice where it is “patently obvious” that the plaintiff cannot possibly prevail based on the facts alleged in the complaint.”) *accord, inter alia*, *Steffen v. United States*, 995 F.3d 1377 (Fed. Cir. 2021), *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (“It is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile.”), *Kennington v. United States Dep’t of the Treasury*, 490 F. App’x 939, 6-7 (10th Cir. 2012) (“Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend.”) (quoting *Curley v. Perry*, 246 F.3d 1278, 1281 (10th Cir. 2001)).

19. These are not, however, the only contexts in which a court may examine a question *sua sponte*, and we feel it imperative to at least touch upon them. Broadly speaking, “when justice requires it, raise critical issues of law *sua sponte*” *U.S. v. Boyd*, 208 F.3d 638, 652 (7th Cir. 2000), and authorities cited therein. Accord *Gill v. I.N.S.*, 420 F.3d 82, 88-89 (2d Cir. 2005). See also *Abdullah v. Groose*, 75 F.3d 408, 414 (8th Cir. 1996) (*en banc*) (GIBSON, J., dissenting) (“appellate courts sometimes raise legal questions *sua sponte* to avoid garbling the law”).
20. Of course, when we raise issues of law *sua sponte*, we must be mindful to remember that “[t]he rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.” *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992) (quoting *United States v. Burke*, 504 U.S. 229, 246, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992), *superseded by statute on other grounds*, (SCALIA, J., concurring)). Whilst we disagree at least in part with the inference that inquisitorial jurisdictions are considerably freer to raise defences and arguments as they please, this characteristic of our courts remains nevertheless fundamental to our adversary system. We must therefore, exercise prudence, and do so only where the higher interests of justice — like here — so command.
21. We think if this exercise of characterisation is to be one which may be suitably addressed *sua sponte* – if such a rare beast were ever to exist – it is our duty to ensure that, firstly, we resolve the question as a pure jurisdictional one, and, failing that – see *infra*, we address it in such a manner so that it remains at all times “a pure question of law *and the opposing parties will not be prejudiced*” *Butler v. Leen*, 4 F.3d 772, 773 (9th Cir. 1993) (emphasis added), never forgetting that our paramount duty

in whatever capacity we sit as remains to promote a just, speedy and inexpensive resolution, not formalism and protraction. Lastly, in doing so, we must not abdicate recognition of the role of the judiciary in the process of litigation.

22. Having established the principles by which our jurisdictional enquiry are to be led we turn to consider each step thereof.

23. We begin with the easiest and most obvious step in this enquiry, namely we must recognise that the plaintiff controls his action, and that just as he is free to choose his parties, see *Schutten*, 421 F.2d, *supra*, at 873, he is also free to select the forum in which his action is brought. We must first of all assume, as we normally do, that the plaintiff intended to bring the action in the court and forum which he asserts on the face of his civil complaint. Where the complaint or petition's assertion of jurisdiction of the court named thereon, assuming there is one, contains persuasive indicia that the plaintiff made a conscious and reflected choice, whether right or wrong, then our enquiry must end there. Not only would we distort the adversary nature of the proceedings, appointing ourselves as the plaintiff's attorney, "the invitation to forum shopping would be irresistible" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985) were a plaintiff free not only to choose the most sympathetic forum to his cause, but be safe in the knowledge that even if that forum decided to shut its door to him we would "regardless of the course of litigation, . . . always constru[e] complaints to raise any legal theory supported by the allegations of the complaint" *Zokari v. Gates*, 561 F.3d 1076, 1086 (10th Cir. 2009). Not only is this approach unsupported by authority, it hardly does any justice. To this end, where, upon an adversary challenge of subject-matter jurisdiction, venue, or personal jurisdiction, the plaintiff defends and reasserts the propriety of jurisdiction we must once again

assume a conscious choice of jurisdiction whose meritoriousness we cannot cure or improve. The second step in this process is to give the complaint a careful reading, looking for indicia as to the plaintiff's true intent. Similarly, it does not suffice to give the plaintiff's pleadings a literal reading, and we must look instead for indicia of his intent. If, for instance, he cites authorities, notwithstanding an erroneous bare assertion of jurisdiction, which paint a picture of a defendant who nevertheless expressed a clear intent to bring a case before a given court and in a given manner – such as where he compares jurisprudential nuances between his asserted jurisdiction and another, that to our mind is likely to contribute a few pieces to the puzzle of a plaintiff's intent.

24. Once the court has overcome the presumption that the assertion of jurisdiction outlined in the complaint is proper – and this must very much be the underlying presumption – we must then attempt to understand what capacity of this court the plaintiff is likely to have thought he was bringing the claim before. In this respect, it cannot be underlined enough that it would be both fundamentally inequitable and conducive to forum shopping to allow our analysis of a petition or complaint to turn it into a “moving target” for the defendant or respondent, introducing new jurisdictional theories at every turn salvage a lost case” *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1206 (10th Cir. 2006). A plaintiff cannot hope to rely on the court's indulgence or liberalism to escape dismissal by leaving the court in effect to choose the optimal jurisdiction and venue for the parties, nor should he be able to sense the adverse winds to his claim and rely on the particular nature of the court's concurrent roles, and its inherent *sua sponte* power which results therefrom, to alter his pleadings in any way other than that which would otherwise be permissible by the ordinary procedures of amendment; our duty to construe liberally the court before which a claim has been brought and, where applicable, the head of

jurisdiction under which it has been brought must be shut out and preserved from its abuse as a litigation strategy, and invoked only in order to prevent earnest omission from defeating the twin aims of just and speedy resolution, or the inconsistent rendering of justice. We must limit ourselves to what we understand the plaintiff *thought mistakenly* he was doing when he brought his suit before us — someone who brings a suit knowingly in a specific court, for instance out of a desire to benefit from a specific procedure or applicable law, cannot hope to benefit from our interpretation to save his suit by reading it as one before the correct court — only the ordinary outcome, such as that of dismissal, will be appropriate.

25. When “interpreting”, for want of a better word, a complaint or a petition at our bar, we cannot forget that it is not our duty to choose the most optimised forum for the plaintiff. It is, however, unreasonable to think that a plaintiff, in bringing an action chose a forum in which an action is definitively unable to be brought — a suit in a United States District Court for a claim arising under state law against a citizen of the same state for ordinary private tort for instance — and that the plaintiff’s fundamental objective is to obtain relief for the facts alleged. The court must therefore commence by proceeding by exclusion, raising only those jurisdictional issues which may be raised at any time and *sua sponte* by the court. In this part of the analysis, we proceed by means of exclusion — we exclude those procedures or “forms of action” under which the action cannot be brought. It is advisable, we think, to start as close as possible to the plaintiff’s stated form, and by means of exclusion move beyond it, excluding each reasonable avenue of relief — the court must not concoct an untested legal theory, however convinced it may be by it, but only those whose general existence and applicability to the case at bar are not, fundamentally exceedingly contentious, even if less well-known than the originally stated action — not only would doing otherwise would inherently

prejudice the defendant, it would cast aside any semblance of adversarialism. We will not, for instance, as a general rule propose *sua sponte* to extend a *Bivens* action to a “new context” solely in order to afford a plaintiff the auspices of Federal jurisdiction and cure a defect of form, although we will, as courts commonly do, recast a § 1983 action as a *Bivens* one. See for instance *Peterson v. Timme*, 621 F. App'x 536 (10th Cir. 2015). Last of all, we ought, since the overriding objective of what (we think) Learned Hand coined as “the juristic principle of procedural economy” *Leach v. Ross Heater Mfg. Co.*, 104 F.2d 88, 93 (2d Cir. 1939) (L. HAND, J., dissenting) governs here in the first place, after our first exclusion of those forms, procedures and jurisdictions which clearly the action was not *intended* to be brought in as the question here is entirely of his profound intent – once again, and we think it obvious by now, only a judge with a strong propensity to revel in the greatest of challenges would want to take up that of overstressing the importance of the fact that we must not put words into the plaintiff’s mouth if he expresses, however misguided, a knowing and voluntary choice to bring his suit in a certain manner – we may also exclude those jurisdictions, forms and claims with respect to which a reading in an uncontentious fashion would lead us to deny the claim anyway on some unwaivable ground.

26. By these unwaivable grounds we think most pertinent those of a fairly straightforward nature – clear and obvious sovereign immunity unwaivable *ad litem*, for instance – and more generally on those grounds over which a court could reasonably and properly, in the state of the action before it dismiss the cause *sua sponte* without first giving the plaintiff leave to amend. In this respect, a concurrence of circuits has held that “[d]ismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility.” *Alston v. Parker*, 363 F.3d 229, 236 (3d Cir. 2004), in other words, it is only proper where it is clear “that

the complaint could not be saved by any amendment” *Gompper v. VISX, Inc.*, 298 F.3d 893 (9th Cir. 2002), *accord Serna v. Denver Police Dep’t*, 58 F.4th 1167, 1172 (10th Cir. 2023) (“Under our precedents, dismissal without leave to amend is appropriate if ‘it would be futile to allow the plaintiff an opportunity to amend.’”) (quoting in part *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006). See generally Wright, Miller and Kane, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.) and authorities cited therein. We do not think that particular notice of the conversion or reinterpretation of the action required in this instance since our duty is to construe the pleadings and attempt to reconstruct what the plaintiff *thought* he was doing *anyway*, and were we to perceive the need, in order to respect the plaintiff’s right to due process, or more generally in order to prevent injustice to present to him an opportunity to alter his pleadings, that would, we think be a very good sign indeed that the court ought not to *sua sponte* exclude such a “form of action”.

27. Once the court has completed this stage of the enquiry, it may well find that there subsists only one, or no, viable procedure. Our enquiry would then be complete, and we would either proceed as if the action were brought under the “viable form” – it is worth noting that for obvious reasons a determination of *prima facie* viability at this stage does not preclude later dismissal on grounds which are proper within the jurisdiction as a court of which we sit and ought not serve as a judicial stamp of approval or operate blessing of immunity from dismissal, nor does an early-stage *sua sponte* interpretative determination set the law of the case – it is merely an exercise in how we should read a complaint, constructing it so as to do justice, and not create superfluous paperwork, not one where we are authorised to pass comment on the propriety of the plaintiff’s choices – accordingly we only carry out the following step of our interpretation if the previous step has not allowed us to identify clearly

what the plaintiff is presumed to have intended to mean. In other words, our *sua sponte* interpretation enquiry does not prevent the parties from raising questions of jurisdiction, nor does it supplant the adversary process, quite to the contrary, our interpretation “crystallizes” *Neitzke v. Williams*, 490 U.S. 319, 330 (1989) the issue of jurisdiction, turning an ambiguous “moving target” into a fixed one which may be attacked and defended through the normal function of a productive adversary process. Meaningful contested proceedings simply cannot take place if each party is singing from his own hymn sheet – they may disagree on how a particular verse is to be sung, but if each chorister were to be given a different hymn sheet altogether, this court’s role as the choirmaster resolving the parties artistic differences would be both meaningless and impossible. See *Getty Petroleum Marketing v. Capital Terminal*, 391 F.3d 312, 324 (1st Cir. 2004) (explaining that normally what the law *says* is not disputed, as opposed to what the law *means*). To this end, this jurisdictional step ought properly be completed at an early stage, such that the proceedings may ordinarily be governed by a settled governing law. Even so, the precise question of *when* raises an interesting and somewhat paradoxical question, since we would perhaps be moving the goalposts for a defendant challenging personal jurisdiction (usually Federal) were we to reserve the question to a later time, even though it appears improper for the Court to insist categorically on interpreting questions of the Court’s jurisdiction in *every* case prior to service, even if we are persuaded that doing so is ordinarily a strong measure of common sense. This, however, must be balanced with our strong preference not for *sua sponte* resolution of all issues, abhorrent to our adversarial judicial tradition, but firstly to giving the parties the right to raise or waive questions of venue and personal jurisdiction as they see fit, and secondly, and more importantly, to remember that “the crucible of adversarial testing is crucial to sound

judicial decisionmaking.” *Sessions v. Dimaya*, 584 U.S. \_\_\_, 138 S.Ct. 1204, 1232, 200 L.Ed.2d 549 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). We think, however, that in any event, regardless of whether it is addressed adversarially, we must, if we are to do justice properly, consider the question at a reasonably early time, perhaps no later than the first reasonably proper time – such as in the first written order after a defendant will have had the chance to present a 12(b) motion and on no account ought we defer such a question beyond a point where procedural or substantive law may plausibly diverge, regardless, we suggest, of whether or not the divergence is actually outcome-determinative, including if the means of service appear to the court to be significantly divergent. Likewise, since we cannot properly enter default against a party over which personal jurisdiction is not established, we must before doing so first interpret the plaintiff’s assertions of jurisdiction and venue insofar as that interpretation is a necessary precursor to the entry of a non-void default judgment.

28. Whilst often the first three steps of the enquiry suffice to identify a plausible jurisdiction, venue and “form” of action or procedure under which the action appears to have been brought, this will not always be the case. We must therefore return anew to the same basic principles which have governed our inquiry thus far for guidance in order to carry out this fourth and final step of enquiry. Whilst this last step is usually not fundamentally jurisdictional – for there are multiple heads of jurisdiction which could entertain the claim – it nevertheless remains prudent of this court, if we are to preserve the adversary nature of litigation and ensure that the court may do substantive justice, to resolve this issue, especially where divergences of substantive and/or procedural law may be outcome determinative, and elsewhere where the interests of justice so require. Since it is impossible to describe a general theory applicable to the

differing shape of each potentially remaining doubt, we may only recall several broad principles by which we are guided. We list each of these principles in what we think to be their logical order.

29. We of course begin, where the choice is between this court sitting as a court of a State or a court of the United States. Here the distinction, we think is fairly straightforward. There can be, to our mind, no better judge of the laws of a state than the courts of that State itself, without prejudice of course to any subsequent and proper motion for removal which may be raised as part of the adversarial judicial process. Likewise, we should not, we think, normally interpret an action where a cause of action arises under a Federal law as arising under the jurisdiction of a State unless some other principle of law requires it. Failing that, a similarly self-explanatory principle lies, we are inclined to think, when we are “choosing between competing plausible interpretations” *Warger v. Shauers*, 574 U.S. 40, 50 (2014), namely that of constitutional avoidance. Despite its origins in a very different context, its very heart, namely that we ought “not to pass on questions of constitutionality . . . unless such adjudication is unavoidable” *Pearson v. Callahan*, 555 U.S. 223, 241 (2009), nevertheless rings true. Accordingly, where two competing interpretations are such that under one “form of action” we will be left only and so inevitably to adjudicate a constitutional question, and on another, there exists a viable non-constitutional issue, preference should usually be given to the latter. Lastly, when, all other things being equal, we are confronted nevertheless with a conflict, due to concurrent jurisdiction over the same claim, in the same manner, we are inclined lastly to favour the court of special or specific jurisdiction over that of more general jurisdiction, for much like how “the ancient interpretive principle” dictates “that the specific governs the general (*generalia specialibus non derogant*)”, *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) –

this presumption is not merely one of an arbitrary or eccentric character but one which is fundamentally prudential in its origin – we must normally assume that in bringing a suit which may be brought either in a court of general jurisdiction or one competent in a specific kind of action, it will be conducive, by reason of its specialisation, to the just, speedy and, often, inexpensive, resolution of an action to bring it in a court whose proceedings and role will have been more narrowly tailored to fit the sort of action with which we are concerned.

30. We pause to remember briefly that our duty is not to “save” the plaintiff’s action at all costs, nor is it to favour the defendant or the plaintiff by choosing the least, or most, respectively, sympathetic forum for an action – it is merely, placed in the misfortunately undeniable reality of the state of litigation at our bar, a necessary step towards discharging our judicial duty in a manner germane to our jurisdiction and in keeping with basic principles of judicial federalism and comity. It is thus not the meritoriousness of an action, or any particularly altruistic equitable vision of vindicating a plaintiff’s rights – it would be rather concerning, we think, if a court were so satisfied of his entitlement to relief at a similarly early stage – which allows us to reinterpret a pleading, but the fact that without doing so, we could not meaningfully render justice (even when this would be against the plaintiff), either because the rules of procedure and decision would have been uncertain, or where the assertion of jurisdiction appears to the court, not to be right or wrong, but to be unintended. The fact that it appears to be so defective on its meritoriousness that straightforward analysis demonstrates clearly that the case has been brought in an improper jurisdiction or under an improper “form” does not *ipso facto* suffice to overcome the strong presumption that the plaintiff controls his action and chose to bring the case in the jurisdiction and “form” he states (and, if misconceived, must also face the consequences of his choice), but

merely constitutes indicia of his intent being elsewhere, since it seems contrary to common sense to, in most cases, presume that the plaintiff made a choice of “form” or jurisdiction that is both otherwise unexplainable and which so obviously is not one which will allow his action to prevail in its core substance.

**C – The cause and form of action**

31. Analogous problems of jurisdiction to those of the original action arise in this second part of our judgment, as pertaining to our own jurisdiction. We apply the framework we set out, *supra*, in doing so.

**Expungements**

32. Having ascertained first the criminal nature of the contempt, we are led next to determine firstly whether or not the expungement procedure under which this action was filed is indeed the proper means by which relief may be sought. Firstly, “[t]here is no [Federal] constitutional basis for a ‘right to expungement.’” *United States v. Willis*, 826 F.3d 1265, 1275 (10th Cir. 2016) (quoting *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 699 (5th Cir. 1997)). Because “[i]t is well settled in this circuit that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances” *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1234 (10th Cir. 2001), there exist in effect two varieties of expungement – first of all, the ordinary proceeding under the laws of the State of Colorado, and secondly, the equitable expungement relief available under federal law<sup>10</sup>.

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<sup>10</sup> We observe that this second variety of equitable expungement appears to be subject to a circuit split. See *United States v. Batmasian*, 66 F.4th 1278 (11th Cir. 2023), but the principle still holds true – for the purposes of this page at least – in our circuit, which has occasionally applied equitable expunction. See for instance *Herrera v. City of Albuquerque*, 589 F.3d 1064 (10th Cir. 2009) (granting an expungement in a civil rights context).

33. We begin with the most common state-law remedy entitled “expungement”. Under G.M.D. § 1-09, a district court of the State of Colorado has jurisdiction over “Class IV expungements” challenging the lawful character of an arrest<sup>11</sup>, and expressly not extending to convictions, and “Class V expungements”, applicable to convictions, grant of which is, at least in part, conditioned “on expression of remorse”. The petitioner, of course, does not express any remorse, nor would one reasonably expect him to, for he seeks to challenge his conviction — remorse, it will be noted, is most often, though not always, at odds with attempting to contest the legality of the decision, nor do we suspect that the petitioner plausibly meets, or even purports to meet the other general criteria of eligibility with respect to which expungement under Class V may be sought.

34. An alternative procedure of state-law expungement may be had under Colo. Rev. Stat. § 19-1-306, relating however to juvenile delinquency, and not general criminal offences. We note lastly that while “[s]ealing differs from expungement in its legal effect” *People v. Connors*, 230 P.3d 1265, 1269 (Colo. App. 2010), the two often have been confused with one another. See also *C.B. v. People*, 122 P.3d 1065 (Colo. App. 2005). This procedure, codified under Colo. Rev. Stat. § 24-72-701 *et seq.*, appears to share a certain nexus in its objectives and applicability to a “Directive 09” expungement. The applicability of such a proceeding, however, requires careful consideration of legal arguments of first impression, and notably “does not vacate a conviction” Colo. Rev. Stat. §

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<sup>11</sup> We note that the paragraph of the aforecited directive pertaining to Class IV expungements reads as follows “Class IV expungements shall apply to standard records that have been determined for removal in a court proceeding, such as in a civil suit for false imprisonment, where the removal of the record is part of the relief awarded to the petitioner. *The process will be in line with standard judicial procedure for the removal of wrongfully issued records.*” (emphasis added). We can only assume, cutting through the galimatias, that the final sentence of the paragraph is to be read as precluding the creation of a cause of action distinct from the ordinary civil action to be had for false arrest.

24-72-703, which appears in effect to be what is sought here – as a reminder, purging civil contempt puts an end to all its legal effects – it does not leave a criminal record and it has no business thereupon.

35. To overcome the presumption that the stated form, a § 1-09 expungement, is how the petition should be read, however, the mere fact that it obviously and plainly has no merit does not normally suffice. We must look to the general nature of the plaintiff's pleadings and claims on the record before us, which describe an instruction given by JUDGE ARTIST to seek expungement as a means of purging a contempt of court order. All of this of course, appears to form part of a curious proceeding, and we daresay that had our brother judge ARTIST taken it unto himself to resolve the issues in the original action we would not have needed to occupy the court and spill a few dozen pages' worth of ink to resolve it – just, speedy and inexpensive resolution often command not that a succession collateral attacks – under Colo. R. Civ. P. 35, then under the State *habeas* statute and lastly under 28 U.S.C. § 2254 – be preferred but that a court resolve the issue before it and lend all-important finality to a proceeding. Since, however, purging of civil contempt neither imputes guilt or remorse, nor stains an otherwise clean criminal record, we are inclined to think that the plaintiff sought to infirm what is, in fact, his conviction.

#### Direct Appeal

36. We look next to what proceeding or “form” the action could be countenanced under. It appears logical to the court to proceed firstly, absent any clear indication as to the contrary, by the one which, for every other to be exercisable, must normally be first exhausted and preferred. Appeal from a County Court judgment or order, as we assume the proceeding was, is to be had, in civil proceedings, before the District

Court, Colo. R. Civ. P. 411. For criminal proceedings, see Colo. R. Crim. P. 37. In any event, a petition or other collateral attack cannot be used in this State as a substitute to an appeal, *Ryan v. Cronin*, 191 Colo. 487 (Colo. 1976) (“We have repeatedly declared that the writ of *habeas corpus* may not be used as a substitute for an appeal and that a hearing on a writ of *habeas corpus* may not be used as a basis for reviewing issues resolved by another court.”), nor can it be done in a Federal court.

37. Since, however, “[a]n appeal is commenced and jurisdiction is invoked by the filing of a notice of appeal with the clerk of the appellate court” *Peterson v. People*, 113 P.3d 706, 709 (Colo. 2005), and no such notice has been forthcoming, nor, by reason of the time taken to proceed thus far under these proceedings, may such a defect be cured – we think this paradox somewhat illustrative of our role in characterisation proceedings, and an opportune juncture to highlight the capital importance of a prompt and timely reconstruction – we think it reasonable to suggest that courts ought to enter such an order at an early stage in proceedings. Unfortunately, however, as we have previously explained, our role is not to “save” actions at all costs, nor is it to identify the correct procedural vessel for the plaintiff at the moment of judgment. Considerations of procedural economy and substantive justice may indeed lead us to reconstrue actions, but there is not therein the slenderest of justification for denaturing the adversary nature of our justice system to the point of substituting the procedural means *at the time of judgment*. In the petitioner-appellant’s case, the correct procedure, at the time of filing, would have been to docket an appeal with this Court, and file a notice of appeal, but by reason of his delay in so doing may now only seek collateral relief, such as through Colo. R. Crim. P. 35. This Court, however, is not at liberty to overcome the jurisdictional defect by *sua sponte* reimagining the proceedings – it is precisely by reason of the lapse

of time between filing and now, and the petitioner-appellant's failure to cure the jurisdictional defect that deprives us of our jurisdiction. Since we must place ourselves at the time of *filing* (or where applicable amendment of pleadings), at *that* time, the petitioner is, to our mind only saved in this defect by the fact that under Colorado law, no appeal is needed in order to file an application for postconviction remedy.

Colo. R. Crim. P. 35

38. We turn lastly to the means which, to our mind, must be regarded as the proper avenue of relief.

39. As we explained in preceding paragraphs of this opinion, we could have ended our analysis with the question of the absence of appellate jurisdiction – certainly, as we explained *supra*, such a proceeding would have had certain not entirely unattractive merits. To do so, however, would, we think, defeat the fundamental character and *raison d'être* of our inherent power of construction provided that, like in the case at bar, more than one possible avenue of relief exists – were the appeal to be the only means of attacking the judgment of JUDGE ARTIST at the time of the application's docketing before this court we would undoubtedly have been obliged to dismiss the action in whole. Since, however, appeal is not in this jurisdiction a prerequisite to postconviction collateral attacks under Rule 35, we both are today and were at the time of filing jurisdictionally in a position so as to hear it. Such we think is a cautionary tale both of the duty of diligence upon the characterising court and of the inherently supplementary, unfavoured, nature of such proceedings – the trouble, we think, were such characterisation not to be undertaken, is that the fundamental objects of justice would no longer be met.

### **III. CONCLUSION AND ORDER**

The Court **ORDERS** as follows;

1. That the petition is **reconstrued** as an application for postconviction relief before the County Court, Boulder County, CO.
2. That the Clerk shall **serve notice** upon the Colorado Department of Justice and Judge Artist of the present order.
3. The court **reserves merits**.

**It is so ORDERED.**

24th October 2023

/s/NewPlayerqwerty

C.U.S.D.J.,

Sitting as a judge of the Colorado County Court,  
Boulder County, CO